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IN THE

# Supreme Court of the United States

OCTOBER TERM

No. 296

BARBARA MITCHELL, et al,

*Petitioners,*

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

*Respondent.*

**(On Petition For Writ Of Certiorari To The Supreme Court Of Illinois)**

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 45 Ill. 2d 148 (1970).

### JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

## CONSTITUTIONAL PROVISIONS

Petitioner relies on the Fourth and Fourteenth Amendments to the Constitution of the United States.

## QUESTION PRESENTED

Whether a defendant, on a motion to quash a search warrant, is entitled as a constitutional right, to go beyond the four corners of the warrant for purposes of testing the truthfulness of the allegations contained within the affidavit.

## STATEMENT OF THE CASE

On April 27, 1967, the defendant, Barbara Mitchell, age 43, was found guilty of possession of gambling paraphernalia (and not guilty of two other counts of gambling, charging the transmitting and distribution of gambling information). Having waived a jury, the defendant was tried before the Honorable Jacques F. Heilingoetter, Judge of the Circuit Court and upon the finding of guilty by the trial court, the defendant was sentenced to pay a fine of $200. Prior to trial a motion to quash the search warrant was heard and the evidence presented therein constituted the State's evidence in the case-in-chief.

The evidence in question was seized from petitioner's apartment following a search under the authority of a search warrant. The search warrant was issued upon the following facts as set out by the Supreme Court of Illinois:

> "[T]he search warrant was issued upon the affidavit of a police officer who stated that he had received

> information from a reliable informer whose previous disclosures had led to a number of arrests or convictions; that the informer had identified a telephone number which he said he called to place bets, and that the telephone company had supplied the name and address of the subscriber of the designated number, which address was set out in the affidavit. Each affidavit then stated that the affiant dialed the number, handed the telephone to the informer, and that the affiant heard the informer place one or more bets on named horses in specified races. Each affidavit stated that the informer said that when he was handed the telephone it was answered by a person unknown to him, with whom he placed his bets. The affidavits stated that the informer said that after the bets were placed, their unknown recipient inquired whether that was all, and the affiant stated that he heard the informer say, "I may call you later," or "That's all for now," or make some similar response." 45 Ill. 2d at 150.

The petitioner's motion to quash the search warrant was denied by the circuit court, and petitioner appealed to the Supreme Court of alleging, in pertinent part, that she was entitled to a hearing on the issue of whether the affidavit for search warrant was fraudulent. The Supreme Court of Illinois, on rehearing, affirmed the holding of the circuit court. *People* v. *Mitchell*, 45 Ill. 2d 148 (1970).

## REASONS FOR DENYING THE WRIT

### ON A MOTION TO QUASH THE SEARCH WARRANT, A DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT FOR THE PURPOSE OF CONTROVERTING THE MATTERS CONTAINED WITHIN THE AFFIDAVIT.

The petitioner asserts that the Supreme Court of Illinois erred in holding that petitioner was not entitled to a hearing on the veracity of the affidavit for search warrant subsequent to the issuance of the search warrant by a magistrate. The People of the State of Illinois submit that the Supreme Court of Illinois did not err.

#### A.

### TO PERMIT A DEFENDANT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT IS INCONSISTENT WITH McCRAY v. ILLINOIS.

The People of the State of Illinois contend that when a law enforcement officer submits his proposed search and the grounds therefor to prior judicial review then the only issue before the trial court on a motion to suppress is the legal sufficiency of the affidavit's allegations. On the other hand when a search is conducted without prior judicial approval then the trial court may fully review both the factual and legal basis of the search. This view of the differing scope of inquiry on a motion to suppress in warrant and non-warrant cases is supported fully by an opinion of this Court decided subsequent to *Rugendorf* v. *United States*, 376 U.S. 528 (1964).

In *McCray v. Illinois*, 386 U.S. 300 (1967) the Court adopted an opinion of the Supreme Court of New Jersey [*State v. Burnett*, 42 N.J. 377, 385-88, 201 A. 2d 39, 43-45 (1964)] stating:

> "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that it should rest entirely with the judge who hears the motion to suppress to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness." (386 U.S. 300, 306-08).

This opinion could not be more clear. "The magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding." There is no reason for this Court now to disregard the confideence in the magistrates of Illinois displayed in *McCray*.

## B.

## TO PERMIT A DEFENDANT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT WOULD RENDER MEANINGLESS THE CONCEPT OF PRIOR JUDICIAL REVIEW OF PROBABLE CAUSE.

The petitioner does not answer (or even attempt to answer) the most nagging question presented by his

contentions. If a defendant is free to attack the credibility judgment of the court issuing the search warrant, what end is served by securing a warrant in the first place? What is the purpose of the warrant procedure?

The simple truth is that if a search upon a legally sufficient warrant is subject to the same scope of attack on a motion to suppress as a search without a warrant, then the act of the police in securing the warrant and the act of the court in issuing it are both pointless.

The inability to assign a meaningful role to the judgment of an issuing judge or magistrate under a rule which makes no distinction between motions to suppress on warrant and non-warrant cases has caused an overwhelming majority of courts to reject the rule defendant advocates.

As this Court has stated: "A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965).

Assuming that a defendant can prove that the allegations in the complaint are untrue, there is little justification for allowing such proof in a motion to suppress real evidence. The admission of illegally seized evidence does not affect the integrity of the process of guilt determination. There is, of course, a significant constitutional and practical difference between alleged errors which affect the reliability of the guilt determining process and those which do not. *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965); *Desist* v. *United States*, 394 U.S. 244, 249-30 (1969); *McCray* v. *Illinois*, 386 U.S. 300, 306-07. Any possible error of the magistrate in issuing a warrant does not affect the reliability or legitimacy of

the evidence seized. Further, the submission of an affidavit to a neutral, detached magistrate, whose judgment as to legal sufficiency is subject to review, would serve the purposes envisioned by the promulgation of the exclusionary rule.

## C.

## A MAJORITY OF JURISDICTIONS DO NOT PERMIT A DEFENDANT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT.

The leading state case on the issue is *Smith* v. *State*, 191 Md. 329, 335; 62 A. 2d 287, 289 (1948) *cert. denied*, 336 U.S. 925 where the court held:

> "The better rule seems to be that the Court's consideration of the showing of probable cause should be confined solely to the affidavit itself, and the truth of the alleged grounds stated in the affidavit cannot be controverted . . . by receiving the testimony of the accused and other witnesses."

The Court of Appeals of Maryland has adhered to this rule despite numerous attacks. *See Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111 (1966) (reviewing recent cases of the United States Supreme Court) *cert. denied*, 386 U.S. 1024; *State* v. *Scarborough*, 238 A. 2d 297, 299 (Md. App. 1968).

The Oklahoma Court of Criminal Appeals has reached a similar result using similar language, *State* v. *Edwards*, 311 P. 2d 266, 269 (1957); *Gaddis* v. *State*, 447 P. 2d 42, 45 (Okla. Crim. 1968); *Phillips* v. *State*, 244 Pac. 451 (Okla. Crim. 1926). Texas has held that "It is well settled that a trial court may not go behind the affidavit for a search warrant to determine the falsity of the facts stated therein in order to invalidate a search warrant valid upon its face." *Griffey* v. *State*, 327 S.W. 2d 585, 587

(Tex. Crim. 1959); *Johnson v. State*, 289 S.W. 2d 249 (Tex. Crim. 1956); *Jackson v. State*, 365 S.W. 935, 938 (Tex. Crim. 1963).

The Supreme Court of Arkansas has recently held similarly: "The general rule is that, in the absence of a statute, a subsequent showing of the falsity of an affidavit for search warrant cannot retrospectively invalidate a warrant valid when it was issued." *Liberto v. State*, 541 S.W. 2d 464, 468 (Ark. 1970).

In Annotation, 5 A.L.R. 2d 394, 396 it is stated that "a large majority of the cases deciding the question apart from governing statutory provisions take the position that one against whom a search warrant is issued may not dispute the matters alleged in the affidavit or verified complaint supporting the warrant . . . [There] are a large number of decisions which represent an overwhelming majority of those cases decided apart from applicable statutes—supporting the view that the matters contained in an affidavit or verified complaint on which a search warrant is based may not be questioned or disputed by the person against whom the warrant is directed." *See Bowen v. Commonwealth*, 251 S.W. 625 (Ky. 1923); *State v. Stevens*, 292 S.W. 36 (Mo. 1927). The rationale of this rule is stated in *Owens v. State*, 399 S.W. 2d 507, 511 (Tenn. 1966):

> "It is clear, then, that the facts stated in the affidavit, i.e., the facts upon which the affiant bases his reasonable belief, are not subject to contradiction at trial for the purpose of suppressing the evidence secured by means of the warrant. This is so because the magistrate determines the verity of the facts, at least he is supposed to, before he issues the warrant."

See also *Gallimore* v. *State*, 116 S.W. 2d 1001 (Tenn. 1938).

The Circuit Court of Appeals for the District of Columbia has held that, "IT is sufficient that the affidavit showed probable cause at the time the warrant was issued." *Kenney* v. *United States*, 157 F. 2d 442 (D.C. Cir. 1946). The rule was followed and other federal precedents were discussed by Judge Holtzhoff in *United States* v. *Giandris*, 25 F.R.D. 194 (D.D.C. 1960); *See also United States* v. *Brunett*, 53 F. 2d 219 (W.D. Mo. 1931); *United States* v. *Bowling*, 351 F. 2d 236, 242 N. 2 (6th Cir. 1965).

Petitioner states that there is a grave conflict in various jurisdictions as to whether an affidavit may be collaterally attacked. It should be noted that, almost without exception, the courts which permit a collateral attack on the affidavit, do so under statutory interpretations—not because of constitutional requirements. *See People* v. *Alfinito*, 211 N.E. 2d 644 (N.Y. App. 1965); *United States* v. *Gillette*, 383 F. 2d 843 (2d Cir. 1967); *King* v. *United States*, 282 F. 2d 398 (4th Cir. 1960); *Wood* v. *State*, 164 S.E. 2d 233 (Ga. App. 1968); *Gonzales* v. *District Court*, 435 P. 2d 384 (Colo. 1967).

## D.

## A DEFENDANT SHOUD NOT BE PERMTTED TO CHALLENGE A PRIOR JUDICIAL DETERMINATION OF PROBABLE CAUSE WITHOUT PRESENTING SUBSTANTIAL JUSTIFICATION FOR SUCH A CHALLENGE — MORE THAN A MERE CREDIBILITY CONTEST BETWEEN DEFENDANT'S WITNESSES AND THE AFFIANT.

Even if a defendant is allowed to challenge the truthfulness of an affidavit the court should require that de-

fendant present more than the prospect of a credibility contest between the affiant and the defendant's witnesses.

If a credibility contest is sufficient cause to allow the truthfulness of an affidavit to be challenged, then every affidavit will be challenged and the dire results the People fear will inevitably occur.

Apart from the conflicting testimony furnished by petitioner, he urged two main facts upon the state courts as tending to prove that fraud was committed in obtaining the search warrant.

First, defendant argues that the relative similarity between the affidavit in this case and those in numerous other cases somehow goes to impeach the credibility of the affiant. The form of the affidavit is a matter determined by police training and experience. Therefore, the similarity in pattern is undoubtedly caused by a police instruction on the subject. This instruction would tell the police what essential elements are necessary for a valid search warrant. Then by following the same pattern every time, any possibility of error is eliminated.

Defendant also argues that the failure of the police to find the particular bets placed by the informant would impeach their credibility. While no explanation appears of record for this missing evidence, it is undisputed, that the police found "records of bets, scratch sheets on the small table in front of the couch." (R. 62). Obviously, Judge Helingoetter did not feel, the fact of the missing bets was sufficient to allow the defendant to go beyond the four corners of search warrant. This conclusion, we submit, is sound and because none of defendant's other reasons or case law (including *People v. Alfinito*, 211 N.E. 2d 181 (N.Y. App. 1965), decided on the basis of a

specific New York statute) support the instant proposition, the People urge this Court to reject it.

This Court should at least require the production of concrete evidence showing beyond reasonable dispute that the statements in the affidavit are materially false—this was not done by petitioner.

## CONCLUSION

The People of the State of Illinois ask this Court to deny the petition for certiorari, because there is no constitutional requirement that a defendant be allowed to challenge a prior judicial factual determination of probable cause for a search, or, in the alternative, because petitioner failed to come forward with concrete evidence showing, substantially, that there was fraud in the procurement of the search warrant.

Respectfully submitted,

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